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No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM 1931

GEORGE P. PORTER, State Auditor and Ex Officio Investment Commissioner of the State of Montana,

Appellant,

INVESTORS SYNDICATE, a Corporation,

Appellee.

Brief of Appellee

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INDEX

	Page
Provisions of Blue Sky Law upon which order in question based	1
Summary of Argument	2
ARGUMENT AND AUTHORITIES:	
I. Right of Appellee to do business in Montana, property protected by 14th Amendment	3
II. Rule with reference to following the state court decisions construing state constitution in determining constitutionality of statute	5
III. Decision of Supreme Court of state controlling	6
IV. Notice and opportunity for hearing required by due process clause of state constitution and 14th Amendment	9
V. Provisions of Blue Sky Law upon which order based violative of due process clause of 14th Amendment for failure to provide any rule or standard	11
VI. Said provisions violative of due process clause for failure to provide for judicial review before order becomes effective	14
VII. Prevention of fraud only basis for Blue Sky Law	16
Order in question price fixing order	18
VIII. If order authorized provisions upon which order based, delegation of legislative power in violation of state constitution	19
IX. Finding that appellee conducting business in an inequitable manner unauthorized by the statute	21
X. Objections to certificate or contract without merit	22
XI. Sufficiency of Complaint	27
XII. Authorities relied upon by Appellant	28

TABLE OF CASES

	Page
Adkins v. Children's Hospital, 261 U. S. 525	12
Ala. & N. O. Trans. Co. v. Doyle, 210 Fed. 173	16
Anderson v. Manchester Fire Ins. Co., 59 Minn. 182	21
Chicago etc. Ry. Co. v. Board of R. R. Commissioners, 76 Mont. 305	6
Chicago, M. & St. P. Ry. Co. v. State of Minnesota, 134 U. S. 418	9–14
Cline v. Frink Dairy Co., 274 U. S. 445	12
Coe v. Armour Fertilizer Works, 237 U. S. 413	9
Coppage v. Kansas, 236 U. S. 1	5
Connally v. General Construction Co., 269 U. S. 385	13
Davis v. Wallace, 257 U. S. 477	3
Dowling v. Lancashire Ins. Co., 65 N. W. (Wis.) 738	21
Fairmont Creamery Co. v. Minnesota, 274 U. S. 1	19
Fidelity Inv. Assn. v. Emerson, 149 N. E. 530	24
Garfield v. U. S. ex rel. Goldsby, 211 U. S. 249	9
Hanley v. Moody, 39 Fed. (2d) 198	18
King v. Concordia Fire Ins. Co., 103 N. W. (Mich.) 616	21
Liggett Co. v. Baldrige, 278 U. S. 105	4
Lochner v. New York, 198 U. S. 45	4
Love v. Atchison T. & S. F. Ry. Co. (C. C. A.) 185 Fed. 321	14
Merrick v. N. W. Halsey & Co., 242 U. S. 568, 61 L. Ed. 498	17
Nalley v. Home Ins. Co., 157 S. W. (Mo.) 769	21
Natl. Automobile Service Corp. v. Barford, 137 Atl. (Pa.) 601	10
Near v. Minnesota ex rel. Olson, 283 U. S. 697	19
Oklahoma Operating Co. v. Love, 252 U. S. 331	14
Phillips v. Commissioner of Internal Revenue, 283 U. S. 589	28

Page

Power Mfg. Co. v. Saunders, 274 U. S. 490 4
Prendergast v. New York Tel. Co., 262 U. S. 43..... 14
Ribnik v. McBride, 277 U. S. 350..... 19
Small Co. v. Sugar Refining Co., 267 U. S. 233..... 13
South Ottawa v. Perkins, 94 U. S. 260..... 5
State v. Holland, 37 Mont. 393 19
Tyson & Bro. v. Banton, 273 U. S. 418..... 19
United States v. Cohen Grocery Co., 255 U. S. 81..... 11
Wadley S. R. Co. v. Georgia, 235 U. S. 651..... 14
Wichita R. R. & L. Co. v. Public Utilities Com. 260 U. S. 48 11
Williams v. Standard Oil Co., 278 U. S. 235..... 19

STATUTES AND CONSTITUTIONS.

Provisions of Blue Sky Law upon which order based 1
Section 4032, Revised Codes of Montana..... 15
Section 4036, Revised Codes of Montana..... 22
Section 4038, Revised Codes of Montana as Amended 14
Section 4045, Revised Codes of Montana..... 22
Section 4049, Revised Codes of Montana..... 15
Section 6282, Revised Codes of Montana..... 25
Section 27, Article III, Constitution of Montana..... 2
Section 1, Article V, Constitution of Montana..... 3
Section 1, Article VII, Constitution of Montana..... 15
14th Amendment 9–11–14

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The provisions of the Blue Sky Law of Montana, pursuant to which the rule or order in question was made, and which it is claimed confer the power to revoke appellee's permit to do business in Montana for failure to comply with said order, are as follows:

1. "The Investment Commissioner shall have general supervision and control, as provided by this act over any and all investment companies," etc.
2. "Such permit, however, shall be subject to revocation at any time by the investment commissioner for cause to him sufficient."
3. "Whenever it shall appear to the Investment Commissioner" that any investment company "is con-

ducting its business in an * * * inequitable * * * manner * * * said Investment Commissioner shall at once cancel its permit." (R. 4.)

SUMMARY OF ARGUMENT

1. These provisions are violative of Section 27 of Article III of the Constitution of Montana, which declares that "No person shall be deprived of life, liberty or property without due process of law," and are also violative of the due process of law clause of the 14th Amendment for the reasons:

(a) Notice and opportunity for a hearing are not required.

(b) No rule or standard is provided for determining what shall constitute sufficient cause or what shall constitute conducting a business in an inequitable manner.

(c) Right to a judicial review of the action of the Investment Commissioner in revoking a permit before the revocation becomes effective is not provided.

2. If said provisions are construed to authorize the revocation or cancellation of a permit whenever, in the opinion of the Investment Commissioner, the securities offered for sale do not promise or furnish a fair return, said provisions are violative of both the due process clause of the Montana Constitution and of the 14th Amendment, for the reason that the sale of securities or the making of investment contracts cannot be prohibited upon such ground or for such reason.

3. If said provisions are construed to authorize the

Investment Commissioner to prescribe the terms and provisions of contracts which investment companies may make, such provisions constitute a delegation of legislative power, in violation of Section 1 of Article V of the Montana Constitution, which declares: "The legislative authority of the state shall be vested in a legislative assembly."

4. The finding upon which the order is based (R. 27) that appellee in offering for sale and selling the certificates, with the withdrawal privilege or surrender value therein provided, is conducting its business in an inequitable manner, is unauthorized by the statute.

5. The objections to the withdrawal privilege or surrender value provided in the certificates are without any merit.

ARGUMENT AND AUTHORITIES

All questions, both local and federal, affecting the correctness of the judgment or decision of the lower court are for decision by this court.

David v. Wallace, 257 U. S. 477.

I.

Right to do business property, and right to make contracts liberty, within protection of 14th Amendment.

The right of appellee to do business in the State of

Montana, pursuant to the permit granted, is property within the protection of the due process clause of the 14th Amendment.

In the case of Liggett Co. v. Baldrige, 278 U. S. 105, this court said:

> "That appellant's business is a property right (citing cases), and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear. That a corporation is a 'person' within the meaning of the due process and equal protection clauses of the 14th Amendment, and that a foreign corporation permitted to do business in a state may not be subjected to state statutes in conflict with the Federal Constitution, is equally well settled. Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U. S. 544 (Citing cases). And, unless justified as a valid exercise of the police power, the act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law."

The protection against state legislation in conflict with the Constitution of the United States applies to statutes in force when the foreign corporation is admitted to do business, as well as to those subsequently enacted.

Power Mfg. Co. v. Saunders, 274 U. S. 490.

The right granted appellee by the permit to make and enter into the contracts in question is liberty protected by the 14th Amendment.

In the case of Locher v. New York, 198 U. S. 45, the court said:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."

In the case of Coppage v. Kansas, 236 U. S. 1 p. 14, the court said:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property."

II.

Rule with reference to following state court decisions construing state constitution.

This court, in determining whether a state statute is violative of the constitution of the state, where the constitutionality of the statute has not been determined by the highest court of the state, will apply the state constitution as construed by the Supreme Court of the state.

In the opinion in the case of South Ottawa v. Perkins, 94 U. S. 260, it is said:

"If, therefore, the law in question had never been passed upon by the State Courts, the Courts of the United States would, nevertheless, be bound to give to the Constitution of Illinois the same construction which the State Courts give to it, and to hold a pretended Act of the Legislature void and not a law which the State Courts would hold to be so. Otherwise, we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State, without any power to arbitrate between them."

III.

Decision of Supreme Court of State in case of Chicago etc. Ry. Co. v. Board, 76 Mont. 305, controlling.

There is no doubt but that the Supreme Court of Montana would hold provisions of the Blue Sky Law under consideration violative of the Constitution of Montana, in view of the decision of that court in the case of Chicago, etc. Ry. Co. v. Board of Railroad Commissioners, 76 Mont. 305.

In that case the court had under consideration a statute providing as follows:

> "The board of railroad commissioners of the state of Montana shall have power and authority, after such investigation as they may deem necessary, and under such rules and regulations as they may establish with reference thereto, to compel railroads or railways or other companies or corporations operating and holding themselves out to be common carriers in the state of Montana, to extend or construct commercial or industrial spurs from construction lines or tracks at stations or from within station limits." (76 Mont. 312.)

In the opinion, it is said:

> "This statute is attacked by the plaintiff as unconstitutional upon several grounds, the chief of which is that it assumes to delegate legislative powers to the board of railroad commissioners. With this main objection the others are interwoven.
>
> * * * *
>
> Necessarily, the extent of the course of procedure and of the rules of decision are for the determination

of the legislature. We think the correct rule as deduced from the better authorities is that if an Act but authorizes the administrative officer or board to carry out the definitely expressed will of the legislature, although procedural directions and the things to be done are specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.

But the power must not be so arbitrary in character as to transgress the 'due process clause' of the state or national Constitution. It would be difficult to couch a statute in more general terms than those employed in the one we are considering. Counsel for plaintiff are justified in saying that whether or not a hearing shall be ordered and the carrier afforded an opportunity to introduce testimony relative to the necessity or propriety of an order requiring construction, or whether the investigation shall be ex parte, if left entirely to the board itself. The statute does not undertake, even in the most general terms, to prescribe the conditions under which the board may compel the carrier to construct a spur. It does not provide that the board may issue its order when reasonable public necessity requires it; there is no indicated rule of decision. It does not require as a condition to the making of the order that the board shall give the carrier notice and a hearing; it does not contain even that procedural direction. On the contrary, it assumes to authorize the board only after such investigation as they may deem necessary, and under such rules and regulations as they may establish with reference thereto to compel common carriers to extend and construct commercial or industrial spurs.

* * * *

When we conceive that the board's order to the carrier to construct the spur-track is in effect a taking of property, for it requires the carries to use its property and spend its money (State of Washington ex rel. R. & N. Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. Rep. 535 (see(also, Rose's

U. S. Notes)), it would seem clear that an order to the carrier made without notice and without a hearing in effect would deprive the carrier of its property without due process of law. Before a valid order of the character in question can be made we hold that notice and opportunity to be heard is indispensable.

* * * *

Whatever may be the rule generally, where the taking of property is involved extra-official or casual notice of a hearing granted as a matter of favor or discretion cannot be deemed a substantial substitute for the due process of law the Constitution requires.

* * * *

The constitutional validity of a law is to be tested not by what has been done under it, but by what may be done under it.

* * * *

Where property is sought to be taken under an administrative regulation 'the defendant must not be denied the right to show that, as matter of law, the order is so arbitrary, unjust and unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment.'

* * * *

This statute, we think, comes within the denunciation expressed in Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, where the court said: "The power given to the administrative officers is not confided to their discretion in the legal sense of that term but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

* * * *

For the reasons foregoing, however, the statute cannot be sustained; it is unconstitutional beyond a reasonable doubt."

This decision is in full accord with the decisions of this court.

IV.

Due process of law clause of 14th Amendment requires notice and opportunity for hearing.

In the case of Garfield v. U. S. ex rel Goldsby, 211 U. S. 249, it is said:

> "In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, *it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.*
>
> The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court." (Italics ours.)

In the case of Chicago, M. St. P. R. Co. v. State of Minnesota, 134 U. S. 418, this court said:

> "No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law."

In Coe v. Armour Fertilizer Works, 237 U. S. 413, it is said:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v.

Palmer, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: "It is not enough that the owners may by chance have notice or that they may as a matter of favor having a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard." The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 336, the court, by Mr. Justice Peckham said, with respect to an assessment for back taxes: "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the tax payer may have received in a particular case that is material, but the question is whether any notice is provided for by the statutes." (citing the New York case.) So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, the court said: "This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace." In Roller v. Holly, 176 U. S. 398, 409, the court declared: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." And in Louisville & N. R. Co. v. Central Stock Yards, Co. 212 U. S. 132, 144, it was said: "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

In the case of Natl. Automobile Service Corp. v. Barford, 137 At. (Penn.) 601, the court declared unconstitutional a statute of Pennsylvania conferring power upon the Insurance Commissioner of that state, because of failure to provide for notice and a hearing.

V.

These provisions relied upon by the Investment Commissioner are violative of the due process clause of the 14th Amendment because no rule or standard is provided to determine what shall constitute sufficient cause or when or under what circumstances business is being conducted in an inequitable manner.

In the case of Wichita R. R. & L. Co. v. Public Utilities Commission, 260 U. S. 48, the court said:

> "In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

In the case of U. S. v. Cohen Grocery Co., 255 U. S. 81, in which the court declared the Act of Congress of August 10, 1910, known as the "Lever Act," unconstitutional, the court said:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, "That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, "constituted a fixing by Congress of an ascertainable standard of guilt, and

> are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary."

In the case of Cline v. Frink Dairy Co., 274 U. S. 445, the court had under consideration and declared unconstitutional an anti-trust statute of Colorado, prohibiting combinations in restraint of trade and to increase or reduce prices, etc. The statute excepted from its operation combinations "the object and purpose of which are to conduct operations at a reasonable profit or to market at reasonable profit these products which cannot otherwise be so marketed." The court in the opinion said:

> "An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the L. Cohen Grocery Co. Case, whether a price charged was unreasonable or excessive."

In the case of Adkins v. Children's Hospital, 261 U. S. 525, which involved the constitutionality of an Act of Congress authorizing the fixing of wages in the District of Columbia for women and minors, the court said:

> "The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical application with any reasonable degree of accuracy. * * * * * * The Board probably found

> it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act,—an infirmity which, in our opinion, plainly exists."

In the case of Connally v. General Construction Co., 269 U. S. 385, the court said:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law," etc.

The rule announced in the foregoing cases is not confined to criminal statutes.

Small Co. v. Sugar Refining Co., 267 U. S. 233.

Appellant's term of office is four years (Montana Constitution, Sec. 1, Art. VII), and will soon expire. His successor may differ with him as to what constitutes sufficient cause or the conducting of business in an "inequitable" manner. His successor may be of the opinion that the withdrawal privilege is not objectionable, or that the one proposed by appellant is not sufficiently favorable to investors, or that some other provision of the contract which has the approval of appellant is inequitable. Again, the appellant may change his mind as apparently he has done with reference to the certificate in question, as he approved same on February 18, 1930. (R. 32.) No guide or standard is provided. The will of the Investment Commissioner is supreme. It cannot be that such a statute meets the requirements of due process of law.

VI.

Right to Judicial Review of order of Investment Commissioner revoking permit before order becomes effective essential to due process of law.

That the right to a judicial review of an order made by an administrative board or officer, the effect of which is to deprive a party of property, is essential to due process of law, has been often announced by this court.

> Chicago, M. & St. P. P. R. Co. v. State of Minnesota, 134 U. S. 418;
> Wadley S. R. Co. v. Georgia, 235 U. S. 651;
> Oklahoma Operating Co. v. Love, 252 U. S. 331.

While Section 4038, as amended by Chapter 174 of the Laws of Montana of 1931, quoted in appellant's brief at page 12, as construed by the lower court, provides for a judicial review of an order of the Investment Commissioner revoking a permit, it is provided therein that

> "Pending any such action, the said findings or decision of the said Commissioner shall be prima facie evidence that they are just and reasonable, and that the facts found are true, *and pending any such* ~~*decision*~~ *the said findings or decision of the Commissioner shall remain in full force and effect.*" (Italics ours.)

The due process of law clause of the 14th Amendment is a protection against a temporary deprivation of property or a right protected thereby, the same as against a permanent deprivation.

> Prendergast v. New York Tel Co., 262 U. S. 43;
> Love v. Atchison T. & S. F. Ry. Co., (C. C. A.) 185 Fed. 321.

Section 4032 Revised Codes of Montana provides:

> "It shall be unlawful for any investment company or stock-broker, or any representative thereof, to sell, offer for sale, take subscriptions for, or negotiate for the sale in any manner whatsoever, of any stocks, bonds, or other securities of any kind or character, other than those exempted from the provisions hereof by the definitions herein provided, without a permit from the state investment commissioner as hereinafter provided."

Section 4049 provides:

> "Any person or persons, agent or agents, investment company, or stock-broker, who shall violate any of the provisions of this act, shall be deemed guilty of a felony, and, upon conviction thereof, shall be fined for each offense not less than one hundred dollars nor more than ten thousand dollars, or by imprisonment in the state penitentiary for not less than ninety days nor more than one year, or by both such fine and imprisonment."

It is admitted that appellee's right to do business in the State of Montana is of a value largely in excess of $3,000.00. (R. 7.) Appellee has over 20 agents or salesmen in Montana, all of whom have been duly licensed to sell these certificates by the Investment Commissioner. (R. 7.) Appellee paid $500.00 pursuant to Chapter 179 of the Laws of Montana, 1929, for the privilege of continuing to do business. (R. 3.)

It, of course, follows that if appellee's permit is revoked, its agents would, in view of the severe penalty provided in said Section 4049, refuse to further sell, and appellee's business would be destroyed, at least pending a judicial review, and in the event the revocation order

should ultimately be set aside, appellee would have no recourse for the damage sustained because of the suspension of its business or for the injury to its reputation and future business.

VII.

It is not within the legislative power of the state, known as the police power, to regulate or prohibit the sale of securities or the making of investment contracts to protect the public against making investments which may not, in the judgment of the Investment Commissioner, promise or furnish a fair return. The prevention of fraud is the purpose of Blue Sky Laws, and the only purpose which will justify such legislation.

In the case of Ala. & N. O. Trans. Co. v. Doyle, 210 Fed. 173, a statutory court of three judges held the Michigan Blue Sky Law of 1913 unconstitutional, as violative of the due process of law clause of the 14th Amendment. In the opinion, the court said:

> "If the Commission finds that the "sale will, in all probability, result in loss to the purchasers," the sale is prohibited. Unless the security is worth the price asked, the "sale will, in all probability, result in loss to the purchaser." This is the plain meaning of the words. In that event, the Commission has no power to permit the sale; and if, after such a finding, the property is sold to a careful purchaser, who is in no way misled, but buys just what he wants and pays what he thinks it is worth, the seller may be imprisoned for five years; and it would be quite immaterial that the Commissioner was wrong and that the security

sold was in fact worth the price. The element of fraud is wholly eliminated from this part of the statute, and all the dependent police power to protect the citizen against fraud must concurrently disappear. No definition of the police power, which we have seen or which the industry of counsel has found, is broad enough to cover such prohibition, and we are aware of no consideration which even plausibly supports its validity.

Of like effect and subject to like infirmity is the provision forbidding the sale of securities, if the Commission thinks that the company's organization or proposed plan of business is not "fair." Broader and vaguer language could not be chosen. It subjects to the practically uncontrolled discretion of the Commission every issue or general sale of stocks, bonds, or securities hereafter to be made in Michigan. For this and the provision regarding probable loss, we heard upon the argument and we find in the briefs no claim of justification on grounds of public welfare; and we know of none. They deprive plaintiffs of property, and they do not carry the semblance of "due process of law."

After this decision, and in 1915, another Blue Sky Law was enacted in Michigan, which eliminated the grounds of unfairness and possible loss to the purchaser and left only the ground of fraud. The constitutionality of this latter statute was considered by this Court in the case of Merrick v. N. W. Halsey & Co., 242 U. S. 568. It was contended that the purpose of this later statute, like the purpose of the statute declared unconstitutional, was not to prevent fraud but to protect the investing public against financial loss and that this was not permissible. In the opinion the court said:

"Indeed, it is asserted that the statute has not that

purpose, "but rather to prevent financial loss." The assertion is against the declaration of the title of the statute and against the words of its body, and cannot be justified by assigning to it the purpose of the law which it amends; nor can we assent to the contention that such purpose must be inferred from paragraph 8 or other provisions which point, it is said, to the probability of financial loss, not fraud. The act must be considered from its declared purpose and as a whole, not from detached portions which can be easily overwhelmed when assigned a false character."

In the case of Hanley v. Moody, 39 Fed. (2d) 198, a three judge court had under consideration a statute of Texas prohibiting the employment of 11 or more laborers in that state to be transported beyond the boundaries of the state, without giving a bond to the state conditioned to furnish return transportation to each person so employed. The court in the opinion said:

> *"We know of no power in either the national or state legislative bodies to compel an individual citizen to make any particular sort of contract."* (Italics ours.)

In the final analysis, the order in question is but a price-fixing order. The rate of interest and the different sums which appellee obligates itself to pay and loan at different periods are fixed with reference to the payments to be made by the purchaser. The change in the obligation of the appellee, as proposed by this order, in effect, gives the purchaser more for his money in the way of withdrawal and time of withdrawal than the contract provides. It is no different in principle from a statute

which would prohibit an extra charge for a theatre ticket entitling the purchaser to the privilege of a reserved seat. Such legislation is prohibited by the 14th Amendment.

Tyson & Bro. v. Banton, 273 U. S. 418;
Fairmont Creamery Co. v. Minnesota, 274 U. S. I.
Near v. Minnesota ex rel. Olson, 283 U. S. 697;
Williams v. Standard Oil Co., 278 U. S. 235.
Ribnik v. McBride, 277 U. S. 350.

VIII.

If the Blue Sky Law is construed to authorize the Investment Commissioner to prescribe the terms and provisions of contracts which Investment Companies may make, it is a clear delegation of legislative power and violative of the Constitution of Montana.

Section 1 of Article V of the Montana Constitution declares:

> "The legislative authority of the state shall be vested in the legislative assembly."

In the case of State v. Holland, 37 Mont. 393, a statute was declared unconstitutional as a delegation of legislative power. The statute prohibited the using or wearing for certain purposes of the badge or other emblem of the secret orders or societies mentioned by any person not "entitled to use or wear the same under the constitution and by-laws, rules and regulations of such order," etc.

The court in the opinion said:

> "All the powers of government being thus vested in the agencies created for their administration, these agencies cannot lawfully delegate them to any person or collection of persons, or even to the people themselves so far as the Constitution directs or per-

mits. (6 Am. & Eng. Ency. of Law, 2d Ed., 1022; Cooley's Constitutional Limitations, 163.) The legislature is empowered to make, alter and repeal laws. The duty to enforce them falls upon the executive. The courts must perform the office of interpreting and expounding them as the law of the land. 'Under a well-balanced Constitution the legislature can no more delegate its proper function than can the judiciary.'

* * * *

In O'Neil v. American Fire Ins. Co., 166 Pa. 72, 45 Am. St. Rep. 650, 30 Atl. 943, 26 L. R. A. 715, the supreme court of Pennsylvania in discussing a statute providing for the adoption of a standard policy of fire insurance, but leaving the form of the policy to be provided by the secretary of state and filed in his office for reference, well said: 'The elementary books divided a statute into three parts—the declaratory, the directory and the vindicatory. In this statute the legislature furnished the first and third. It delegated the preparation of the second. It declared, in effect, the need of a standard form of policy. It provided punishment for the failure to use such form when provided; but it turned the preparation of the form over to its appointee, and gave him six months in which to do his work and file a copy of it in his office. Whoever might be interested in knowing the directory part of the statute, and understanding what it was he was required to do, had to go beyond the Act of assembly, and inquire of the appointee of the legislature what it was he had filed in his office, of which the people of the commonwealth were bound to take notice at their peril. It will not do to say that the preparation of the form was an unimportant matter of detail, or an act partaking of an executive or administrative character. It was the sole purpose of the Act. It was the only subject named in its title. The enforcement of the standard form of policy was the only object of its penalties. Take out the form prepared by the insurance commissioner, and to be found in

some pigeonhole in his office, and the Act is without meaning or effect. It is completely eviscerated. We do not see how a case could be stated that would show a more complete and unconstitutional surrender of the legislative function to an appointee than that presented by the Act of 1891. By its provisions the legislature says, in effect, to its appointee: 'Prepare just such a policy or contract as you please. We do not care to know what it is. The governor shall have no opportunity to veto it. File it in your office, and we will compel its adoption, whether it is right or wrong, by the punishment of every company, officer, or agent who hesitates to use it.' Upon the same question, see, also, (Citing cases). So here the sole purpose of the legislation was to prevent frauds and abuses perpetrated by the use of certain articles. The legislature declared the prohibition and provided the penalty for its violation, but left it to different societies to supply by declaration in their secret work from time to time, as their varying choice might dictate, the description of the articles themselves. In our opinion this contention of the appellant must be sustained.''

See also:

Anderson v. Manchester Fire Ins. Co., 59 Minn. 182;
Nalley v. Home Ins. Co., 157 S. W. (Mo.) 769;
Dowling v. Lancashire Ins. Co., 65 N. W. (Wisc.) 738;
King v. Concordia Fire Ins. Co., 103 N. W. (Mich.) 616.

IX.

Finding that appellee in offering for sale and selling the certificates with the withdrawal privilege or surrender value therein provided is conducting its business in an inequitable manner, is unauthorized by the statute.

The provision authorizing the Investment Commissioner

to revoke a permit "for cause to him sufficient" should, we think, be construed in connection with Section 4045, and that the cause must be one of the grounds for cancellation provided in said Section 4045. One of the grounds for cancellation provided in Section 4045 is the conducting of business in an "inequitable" manner. It is this ground upon which the order in question is based. Appellant as Investment Commissioner found that in selling or offering for sale the certificates with the withdrawal privilege or surrender value provided therein, appellee is conducting its business in an inequitable manner. (R. 29).

The Investment Commissioner must pursuant to the provisions of Section 4036 find, before issuing a permit, that "the proposed contracts contain and provide for a fair, just, and equitable plan for the transaction of business, and in his judgment promises a fair return." As this finding must be made before a permit is issued, the provision of Section 4045, authorizing the cancellation of a permit where the business is conducted in an inequitable manner, can have no reference to the terms and provisions of the contract.

X.

The objections to the withdrawal privilege or surrender value are without merit.

The order is directed to the certificate, the form of which is attached to the complaint as Exhibit "A." While the answer denies that this form of certificate was ap-

proved before the permit was issued, (R. 17), it was stipulated that the form was approved by the Investment Commissioner on February 18th, 1930, (R. 31). The form of certificate introduced as a part of the stipulation was the form approved by the issuance of the permit and the form for which Exhibit "A" to the complaint was substituted. The provision of the certificate to which objection is made is contained in paragraph 11 on the third page of the certificate, and is as follows:

> "11. OPTIONAL SETTLEMENTS PRIOR TO MATURITY. After this Certificate has been in force for any one of the periods shown in the following schedule, exclusive of any period or periods of default, the second party, upon written request and surrender of this Certificate, may elect to receive in cash, per thousand of maturity amount, the sums shown in the following schedule, less any indebtedness secured by this Certificate:
>
18 mos.	2 yrs.	3 yrs.	4 yrs.	5 yrs.	6 yrs.	7 yrs.	8 yrs.	9 yrs.	10 yrs.
$42	$84	$166	$254	$370	$468	$580	$704	$830	$1000"

The certificate provides, in paragraph 2:

> "This Certificate is payable annually in advance, but the second party shall have the right to meet any current year's requirements by monthly payments of $6.50, quarterly payments of $19.30 or semi-annual payments of $38.40 on each $1000 of the maturity amount of this Certificate. The second party shall have the right at any time to change from one method of payment to another."

The certificate provides, in paragraph 10:

> "The Company will loan at any time, upon proper assignment of this Certificate as sole security, a sum

> equal to (or less, at the option of the second party) the optional settlement amounts then payable under Paragraph 11 of this Certificate."

In the case of Fidelity Inv. Assn. v. Emerson, 149 N. E. 530, the Supreme Court of Illinois passed on the validity of an order of the Secretary of State cancelling a permit to sell a certificate like the certificate under consideration. The Illinois statute provided that "the Secretary of State shall also have the power at any time, after five days' notice to the seller of securities, when insolvency exists, or when in the opinion of the Secretary of State the further sale of such securities would work or tend to work a fraud upon purchasers thereof, to suspend or cancel permission to sell such securities in this state." The order of cancellation set forth the reasons upon which the order was based, among which was the following:

> "(5). In the proposed modified form of contract no withdrawal value is provided for those unable to carry or make the payments until the initial and 12 monthly payments have been made, and the surrender privileges allowed, where the contract has been carried one year, gives the investor less than one-half of the money actually paid by him; i. e., on a contract $180 has been paid in at the end of one year, a cash surrender value of $88 may be taken, but the investor must wait three months to receive this amount."

The court set aside the order and in the opinion said:

> "An objection made to the contract is that in its proposed modified form its provides for no withdrawal value until the first year's payment have been made in full, and that the amount of such withdrawal at the end of the first year is less than half the

amount of the first year's payments. These contracts are entered into with reference to a series of regular payments to be made monthly for 126 months. The expense of procuring the contract is incurred at the beginning. It is not unreasonable—at least it is not fraudulent—if it is agreed that if the contract holder desires to withdraw from the contract at the end of the first year, a part or all of the expense to the association of obtaining his contract, which is canceled, should be charged against him in the settlement. There is no public policy of the state which requires that annuity contracts shall provide for their surrender before maturity, and in such case shall require the return to the contract holder of all the payments he has made. The Act which has been previously referred to, which requires in certain cases of annuity contracts that the annuity in case of nonpayment of premium shall automatically be converted into a paid-up annuity, requires such paid-up annuity only after the payment of three full years' premiums, and, so far as this indicates any public policy, it is not inconsistent with the provisions of the plaintiff in error's contracts in regard to paid-up annuities or loan or surrender values."

Attention is directed to the fact that Section 6282 of the Revised Codes of Montana requires life insurance policies to provide that "In the event of default in payment of any premium due on any policy, provided not less than three full years' premiums shall have been paid, there shall be secured to the insured, etc."

It should be noted that the business of appellee is not that of receiving deposits subject to withdrawal from time to time on the order of the depositors. The withdrawal or surrender values are plainly stated in bold type in the contract. The order is not one protecting investors against

loss through insolvency. On the contrary, the order increases the risk of insolvency, as it requires the payment of more money than is now promised. It, in effect, says to appellee and investors that although the purchaser knows exactly what he is buying, and chooses to invest, he cannot do so.

PROVISIONS OF CERTIFICATES

Appellant has stated some provisions incorrectly and has failed to refer to other provisions of the contract which alter the conclusions reached. On page 2 of appellant's brief, it is stated that the certificate "causes the purchaser to forfeit all payments made during the first eighteen months in case he defaults in payments." This is not correct. Appellant's brief has omitted reference to paragraphs 4 and 5. By paragraph 5, if the earning power of the certificate holder is cut off by disability or death, he or his representative may receive the full amount paid in with interest at 4% compounded. By paragraph 4 a certificate holder may reinstate by paying one monthly payment at any time within two years and without the requirement of making up payments missed. Even after that time, by paying $1.00 reissuance charge, and resuming payments, he receives a new certificate of the kind then in force, with credit in full for all previous payments. Under paragraph 7 the contract is assignable and he can sell to one ready to go on with the contract. The contract provides for both permanent and temporary con-

ditions affecting the holder and does not forfeit his payments. The contract does not purport to provide for a savings bank for funds available at any time. It is substantially the endowment policy of insurance companies, with term life protection eliminated. The surrender values are the sums fixed in the event the holder chooses to discontinue.

Likewise, on pages 2 and 3 of appellant's brief a situation is given of an eighteen months' holder paying $148.00 and receiving $42.00. But, under paragraph 10, he can borrow this sum and at the end of six months receive the balance of the second year's cash surrender value, or, he can wait six months and receive the second year's surrender value without borrowing.

The statement in the brief (p. 3) of $370 being paid and receipt of the fourth year surrender value of $254, presupposes that the fifth year payment must first be made before surrender, which is not the fact. The tables near the close of appellant's brief are based upon the same rate of interest for a holder who pays part time and discontinues (of his own volition) as for a holder who continues on for the full ten year period, which is not reasonable.

XI.

Sufficiency of Complaint

Suffice it to say in answer to the contention that appellee does not come into court with "clean hands" that the certificate to which objection was made was approved by appellant on February 18, 1930. (R. 32.)

XII.

Authorities cited in Appellant's Brief and in Dissenting Opinion of District Judge Bourquin.

We deem it unnecessary to review these authorities as they speak for themselves. We feel warranted in saying that they are not applicable to the facts of this case, and make no pronouncements in conflict with the principles which should control, and firmly established by the decisions of this court and of the Supreme Court of Montana. The cases cited for appellant relating to the exercise of the power of eminent domain and the power of taxation are clearly distinguishable, for the reason, as stated in the Phillips case, 283 U. S. 589, "Property rights must yield provisionally to government need."

Respectfully submitted,

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Solicitors for Appellee.

M. S. GUNN,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 627.—October Term, 1931.

George P. Porter, Auditor, etc., Appellant, *vs.* Investors Syndicate, a Corporation.	Appeal from the District Court for the District of Montana.

[May 23, 1932.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from the decree of a specially constituted district court enjoining the enforcement of an order of the State Auditor, who is *ex officio* Investment Commissioner of Montana. Appellee is a Minnesota corporation engaged in the business of selling investment certificates for which the purchaser pays in instalments and which entitle him at a date therein named to receive their face value. The assumption is that the instalments of principal paid in will be augmented by interest thereon compounded at five and one-half per cent, so that the company will be able to pay the sum named in the certificate before the holder's payments reach that total.

Appellee was licensed in 1930 to do business in Montana pursuant to Chapter 264 Revised Code of 1921, popularly known as the Blue Sky Law, which defines investment companies (§ 4026), forbids their engaging in business without a permit from the state investment commissioner (§ 4032), requires them to apply for such permit and to submit certain information with the application (§ 4033), directs the commissioner to examine the data furnished and to issue or refuse a permit depending upon his determination that the applicant is solvent and its proposed plan of business fair, just and equitable (§4036), and to supervise and from time to time examine the affairs and business of all permittees (§ 4043). Section 4045, which authorizes the revocation of permits, and Section 4038 (as amended by Chap. 194, Session Laws 1931) which gives an action against the commissioner by a party aggrieved by any finding or decision of that officer, are those

which affect the present litigation. They are quoted in the margin.*

Operating under permit appellee has built up a large business in Montana in the sale of its certificates. One form of these provides that in case of default in current payments during the first eighteen months, the purchaser shall forfeit all sums theretofore paid; for default after eighteen months, where payment of $148 on a thousand dollar certificate has been made, the holder is entitled to withdraw $42; after four years and payment of $370, the refund is $254; and after five years he is entitled to repayment, without interest, of the whole amount theretofore paid.

On May 7, 1931, the appellant notified the appellee and others similarly engaged to attend a hearing relative to the proposed adoption of a rule applicable to their business. Appellee appeared by an officer and counsel and stated objections. As a result of the hearing a rule was promulgated June 22, 1931, effective July 22, 1931, forbidding the issuance of certificates extending the privilege of withdrawal before maturity unless they

*4045. Revocation of Permits and Appointment of Receiver. Whenever it shall appear to the investment commissioner that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable, or unauthorized manner, or is jeopardizing the interests of its stockholders or the investors in stocks, bonds, or other securities by it offered for sale, or whenever any investment company shall refuse to file any papers, statements, or documents required under this act, or shall refuse to permit an examination by said investment commissioner, or his deputies or agents, as provided in this act, without giving satisfactory reasons therefor, said investment commissioner shall at once cancel its permit, and if he shall deem advisable, shall communicate such facts to the attorney-general, who shall thereupon at once make an investigation, and if the facts as presented to him by the investment commissioner are substantiated, he shall thereupon apply to a court of competent jurisdiction for the appointment of a receiver to take charge of and conclude the business and affairs of such investment company, and if such fact or facts be made to appear, it shall be sufficient evidence to authorize the appointment of a receiver and the making of such orders and decrees in such cases as equity may require.

Section 4038. Any interested person, who has appeared, co-partnership, association or corporation being dissatisfied with any finding, findings or decision of the Commissioner made in accordance with the provisions of this Act, may within thirty days from the making thereof, commence an action in any court of competent jurisdiction against said Commissioner as de-

should permit withdrawal at any time after the first year of their existence, on ninety days' notice in writing, and thereupon entitle the holder to receive the total amount of all instalments paid in, less a penalty not exceeding three and one-half per cent of the matured or face value of the certificate, plus interest compounded annually, at the rate at which the certificate was guaranteed to mature or represented to pay at maturity; and that the certificate and the application should have printed thereon the amount to be paid in, the withdrawal or surrender value, and the loan value, as of the end of each year after the date of issuance.

The commissioner claimed authority to promulgate this order under that portion of § 4045 which empowers him to revoke the permit of an investment company when it shall appear to him to be "conducting its business in an unsafe, inequitable or unauthorized manner". He asserted his intention to revoke appellee's permit if it failed to obey the rule; whereupon the latter brought action in the District Court to enjoin the appellant from revoking or purporting or attempting to revoke its permit for failure to comply with the order. After the taking of evidence upon a motion for a temporary restraining order the case was by stipulation submitted as upon final hearing. The court granted an injunction, holding that the challenged statute was violative

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fendant, to vacate and set aside said finding, findings or decision, on the ground that the said findings or decision are unjust or unreasonable. The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state and on the hearing the judge of said court may set aside, modify or confirm said findings or decision as the evidence and the rules or equity may require. Appeals may be taken from the decision of the district court to the Supreme Court by either party in the same manner as is provided by law in other civil actions. Pending any such action, the said findings or decision of said Commissioner shall be prima facie evidence that they are just and reasonable and that the facts found are true, and pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding.

Provided, however, that the original application with reference to which an appeal is herein provided for shall not be heard by the Investment Commissioner until notice of hearing on the same has been published in some newspaper published at the capital city daily, in at least seven issues of such paper, and provided further, that upon such hearing on the original application, any person, co-partnership, association or corporation interested in or opposed to said application may appear.

of the due process clause of the Fourteenth Amendment, as lacking any provision for notice or hearing before the revocation of a license, and also because no rule or standard is fixed for the determination of adequate cause for revocation; and further the act constituted a delegation of legislative power contrary to the mandate of Section 1, Article V, of the Constitution of Montana. The appellant assigns these rulings as error, and in addition contends that there was no jurisdiction in a federal equity court to entertain the cause. If this position is sound we need not consider the other alleged errors.

We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (*supra*) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge "may set aside, modify or confirm said . . . decision as the evidence and the rules or (*sic*) equity may require". The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to modify or to affirm the commissioner's order, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 229-230; *Pacific Live Stock Co.* v. *Lewis*, 241 U. S. 440, 444, 450-451. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 438-442. When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order.

But we are told that the commissioner asserted his intention to enforce the order, and that the statute forbids the state court to afford interlocutory relief. Thus, says the appellee, though trial might result in a decision vacating the commissioner's order, in the interval irreparable harm would have been done by the revocation of the company's permit, and its officers and agents rendered liable to criminal prosecution. Such a state of the law, it is insisted, amounts to a denial of due process to which one confronted with the possible loss of property is not bound to submit, but may at once, if there be the requisite diversity of citizenship and amount in controversy, apply to a federal court for relief. Conceding the correctness of the premises, the conclusion is sound. *Pacific Telephone Co.* v. *Kuykendall,* 265 U. S. 196. The appellant, however, denies the asserted statutory prohibition, and says that the plaintiff in an action attacking a decision by the commissioner may upon a proper showing obtain a stay of its operation.

These opposing views require a construction of the act. Section 4038 as amended provides, so far as applicable:

"The rules of pleading and procedure in such action shall be the same as are provided by law for the trial of equitable actions in the district courts of this state. . . . and pending any such action the said findings or decision of the Commissioner shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding."

We are cited to no case, nor have we found any, in which the state courts have interpreted or applied the section. The first clause would obviously permit the issuance of an interlocutory injunction upon a proper showing, especially in view of the provisions of the Code of Civil Procedure.* But it is said that the

*§ 9243. Injunction Order—When Granted. An injunction order may be granted in the following cases: 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or, any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; 2. When it shall appear by the complaint or affidavit that the commission or continuance of some during the litigation would produce a great or irreparable injury to the plaintiff; . . .

See also §§ 9244, 9245, 9246, 9247, 9250, 9251 and 9252, dealing with security to be entered on interlocutory injunction, motions to dissolve the same before trial, etc.

succeeding clause precludes such a remedy. The argument is that the words "pending any such action" mean that during the continuance of the action and until its final decision the commissioner's order must remain in full force and effect. We think, however, that in this phrase the word "pending" has the significance of "until", or while the time is running for bringing such an action. This is one of the recognized meanings of the word, and that it is so used we think is made clear from the sentence immediately following, to the effect that if no action shall be brought to set aside the finding or decision within thirty days it shall become final and binding. When considered together we are of opinion that the two phrases mean that unless and until a person affected brings his action he may not disregard the order. We are persuaded to this view for the reason that it supports the constitutionality of the act, and we are bound if fairly possible to construe the law so as to avoid the conclusion of unconstitutionality. *Bratton* v. *Chandler,* 260 U. S. 110. The construction thus adopted is consistent with the validity of the act, whereas that pressed upon us by the appellee would clearly render it unconstitutional.

Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 454. But where either the plain provisions of the statute (*Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 203, 204) or the decisions of the state courts interpreting the act (*Oklahoma Nat. Gas Co.* v. *Russell,* 261 U. S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified.

The present case is not one in which the review of the commissioner's action is judicial in character. If it were the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a judicial review in the state courts would apply. See *Bacon* v. *Public Service Commission,* 232 U. S. 134; *Prendergast* v. *New York Tel. Co.*

262 U. S. 43; *Railroad Commission* v. *Duluth St. Ry Co.*, 273 U. S. 625. As we have seen, under the Montana statute the administrative proceeding is not complete until the court shall have acted in revision and correction of the commissioner's decision. It would be strange indeed if the commissioner's action thus subject to alteration were nevertheless to be made as effective to harm the parties in interest as if no further administrative proce lure existed. We can not so read the act in the absence of clear and unambiguous phraseology requiring that course, or of a decision of the state court so construing it.

The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.